Ref. No. 420

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 8, 1992

UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. 1324a Proceeding
ELDER JEREZ, D/B/A GREEN SCAPING, Respondent	)	OCAHO Case No. 91100227

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On March 9, 1992, pursuant to the provisions of the pertinent procedural rule, 28 C.F.R. §68.38, complainant filed a Motion for Summary Decision.

In that motion, complainant avers that on November 12, 1991, the Immigration and Naturalization Service (INS) issued and served upon respondent a Notice of Intent to Fine for having violated the provisions of 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b) by having failed to make available for inspection the required employment eligibility verification forms (Forms I-9) concerning some 43 individuals hired by respondent after November 6, 1986 for employment in the United States.

In that citation, also, a civil money penalty of $8,600, or $200 for each of the 43 alleged violations, was assessed against respondent.

On December 19, 1991, following respondent's request for a hearing before an Administrative Law Judge, complainant filed the single-count Complaint at issue, realleging the 43 previously described alleged violations and reasserting its demand that a civil money penalty totalling $8,600 be assessed.

On January 31, 1992, respondent filed its Answer, denying generally each and every allegation in the Complaint.

On February 12, 1992, complainant filed a Motion to Compel Discovery, reciting therein that on January 2, 1992 respondent's counsel of record had been served Complainant's Requests for Admissions of Fact, as well as Complainant's First Set of Interrogatories and Complainant's First Request for Production of Documents, and further that respondent had not filed replies to any of those discovery requests. Accordingly, since respondent had not filed written discovery responses within 30 days after service of the requests, as required by the provisions of 28 C.F.R. §§68.19(b), 68.20(d) and 68.21(b), complainant requested that respondent be ordered to file discovery responses within two weeks of the issuance of such order.

On February 12, 1992, complainant's Motion to Compel Discovery was granted and respondent was ordered to provide to complainant copies of the documents which complainant had previously requested and also to furnish to complainant written answers to all outstanding interrogatories and to have done so within 15 days of its acknowledged receipt of that order.

In that order granting complainant's Motion to Compel Discovery, also, each matter for which an admission had been requested by complainant in the course of filing its Requests for Admissions on January 2, 1992, was deemed to have been admitted by respondent, in accordance with the provisions of 28 C.F.R. §68.21(b), owing to respondent's having failed to reply to those requests for admissions within 30 days after accepting service of those requests on January 2, 1992.

In its March 9, 1992 Motion for Summary Decision, complainant argues that the pertinent provision of IRCA, 8 U.S.C. §1324a(b)(3), as well as that of its regulatory analog, 8 C.F.R. §274a.2(b)(2)(ii), require that Forms I-9 in their original form must be retained and made available for inspection by enforcement officers and that failure to do so results in strict liability. U.S. v. Mester Manufacturing Co., 1 OCAHO 18 (6/17/88); affirmed Mester Manufacturing Co. v. INS, 879 F.2d 201 (9th Cir. 1990); U.S. v. Big Bear Market, 1 OCAHO 49 (4/12/89); affirmed Big Bear Super Market v. INS, 913 F.2d 754 (9th Cir. 1990); U.S. v. USA Cafe, 1 OCAHO 42 (2/6/89); U.S. v. Broadway Tire, 1 OCAHO 226 (8/30/90); U.S. v. New El Rey Sausage, 1 OCAHO 66 (7/7/89).

In that motion, also, complainant maintains that the pertinent provisions of IRCA and the implementing regulations, 8 U.S.C. §1324a(e)(5) and 8 C.F.R. §274a.10(b)(2), respectively, provide for a civil penalty in an amount of not less than $100 and not more than $1,000 for each of the 43 violations at issue, giving

consideration to: (1) the size of the business of the employer being charged; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized alien; and (5) the history of prior violations.

Complainant further urges that in assessing fines of $200 for each of the 43 cited violations, or a total civil money penalty assessment of $8,600, the INS enforcement officers imposed penalties at the low end of that mandated assessment range. Accordingly, complainant believes that the $8,600 total civil money penalty sum is reasonable and should be upheld.

On March 18, 1992, respondent filed an Amended Answer to the Complaint, admitting all allegations except that which alleged that respondents had failed to prepare the 43 Forms I-9 at issue. In that amended responsive pleading, respondent also asserted as an affirmative defense the fact that the 43 Forms I-9 are inexplicably missing due to circumstances beyond respondent's "forseeable and reasonable control".

In that responsive pleading, also, respondent again prayed that complainant's request for civil penalties be denied, that respondent be reimbursed his costs and fees herein, and any other appropriate relief.

On March 18, 1992, respondent also filed his answers to complainant's 19 interrogatories and furnished copies of his Federal tax returns for the years 1989 and 1990, the documents which had been requested earlier in Complainant's First Request for Production of Documents.

On March 18, 1992, also, respondent filed a memorandum opposing Complainant's Motion for Summary Decision. In that memorandum, respondent contends that the circumstances of respondent's inability to produce the Forms I-9 at issue constitutes a material fact which precludes the granting of complainant's motion since a formal administrative hearing must be conducted in order to rule upon that assertion.

The rules of practice and procedure applicable to this proceeding provide for the entry of a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c). As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

One of the principal purposes of the summary judgment procedure is that of isolating and disposing of factually unsupported claims or defenses. However, a party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Complainant argues that respondent's inability to make available the 43 Forms I-9 at issue to the INS enforcement officers is, standing alone, sufficient evidence to enter a finding in its behalf on the facts of violation.

In view of that contention, it might be well to examine the statutory provision which respondent has been charged with having violated, 8 U.S.C. §1324a(b)(3): "Retention of verification form. - After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain the form and make it available for inspection by officers of the service ****".

When assigning to that statutory expression the ordinary meaning of the words employed, it is readily seen that respondent was required to complete a Form I-9 for each of the 43 individuals involved and, more importantly for our purposes, to retain such forms for inspection purposes. Respondent failed to do so, for whatever reason, and resultingly it must be found that he violated that IRCA provision, as complainant has alleged. That ruling must follow if the clear and unambiguous statutory wording is to be given a fair and reasonable meaning.

Accordingly, respondent may not successfully contest the alleged facts of violation by showing, as he contends, that the Forms I-9 were prepared but that those forms have become unexplainedly lost in the course of moving respondent's business office from one location to another between the date the forms were prepared and the date upon which INS scheduled an enforcement visit in order to inspect those forms.

In view of that finding, complainant has borne its initial responsibility of demonstrating the absence of a genuine issue of material fact concerning the facts of violation set forth in the Complaint at issue.

Meanwhile, as noted earlier, respondent admits that he failed to make available for INS inspection the pertinent 43 Forms I-9.

In that factual posture, complainant's Motion for Summary Decision, as it relates to the facts of violation at issue, must be and is being granted.

The remaining issue to be addressed is the appropriate civil money penalty to be levied. Under these facts, 43 civil penalty sums must be assessed, in amounts ranging from the statutorily mandated minimum of $100 for each violation to a maximum sum of $1,000 for each of the 43 proven violations. That because the applicable provisions of IRCA provide that civil money penalties for paperwork violations "shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." 8 U.S.S. §1324a(e)(5).

It is in connection with the civil penalty assessments that respondent can properly assert its contention that, owing to the fact that the Forms I-9 are lost, the proposed civil penalty sum should be waived, owing to the showing of good faith on respondent's part. In any event, however, as noted in the preceding paragraph, respondent must be assessed a minimum civil money penalties totalling $4,300, or the statutory minimum of $100 for each of the 43 violations herein.

Complainant has assessed a total civil penalty of $8,600 or $200 for each of these 43 paperwork violations. Given that fact, complainant has impliedly found that it does not consider respondent's conduct to have been in any manner egregious.

Accordingly, I find that the appropriate civil money penalty for each of the 43 violations in the Complaint is $100, or a total civil money penalty sum of $4,300. Respondent is reminded, however, that repeat infractions of this character can bring civil money penalties of up to $1,000 for each violation, or a potential 10-fold increase in its liability exposure for subsequent similar violations.

In summary, complainant's Motion for Summary Decision is granted inasmuch as complainant has demonstrated the absence of a genuine issue of material fact in connection with respondent's having violated the provisions of 8 U.S.C §1324a(b)(3) in the manner alleged in the Complaint. And correspondingly, respondent has failed to demonstrate facts which disclose the existence of a genuine issue for trial, as they relate to the facts of violation.

In addition, respondent is hereby ordered to pay the sum of $4,300 as the appropriate civil money assessment, or $100 for each of the 43 paperwork violations alleged in the Complaint.

The adjudicatory hearing in this matter, previously scheduled to have been conducted in Livermore, California on July 8, 1992, is hereby cancelled.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

This Order may be appealed in accordance with the provisions of 8 U.S.C. §1324a(e)(7) and those provisions set forth in 28 C.F.R. §68.1 - .52, Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices.